

Clean Air Act Fines and Penalties

Impact on the Air Force

The following discussion focuses on what to do when Air Force installations are subject to fines and penalties imposed by states and EPA for violations of the Clean Air Act (CAA) and its Amendments, and state air pollution control laws and regulations. While the information in this discussion is current as of Jul 00, the issue continues to evolve. Thus, the following information will be updated, as necessary, to stay current and to keep installations informed about the latest Air Force position regarding CAA fines and penalties.

What is "sovereign immunity"?

Regulation by state or local governments requires a waiver by the Federal entity of its sovereign immunity. Historically, a sovereign is neither obliged to follow the law nor can it be sued without its consent. In the environmental context, the term "sovereign immunity" often includes the doctrine of Federal Supremacy guaranteed by Article VI of the U.S. Constitution. This doctrine generally ensures that state and local governments cannot hinder essential Federal government functions. In the environmental compliance arena, however, both Federal sovereign immunity from suit and Federal Supremacy have been greatly eroded. However, the United States is subject to suit only to the extent to which it *clearly and unequivocally* waives its sovereign immunity. Such a waiver must be "unequivocally expressed" in the language of the statute concerned, or in other words, absolute clarity is a must in the statutory wording. If there is more than one plausible reading of the statutory language and one of those readings is not consistent with a waiver of sovereign immunity, there is no "clear and unequivocal" waiver.

It is important to note that *only* Congress can waive sovereign immunity. Therefore, Executive Orders, compliance agreements and individual actions of base commanders (past and present) cannot waive sovereign immunity. (See *U.S. Department of Energy v. Ohio*, 112 S.Ct. 1627, 1639; *Block v. North Dakota*, 461 U.S. 273, 287 (1983)).

Civil Fines and Penalties

There are two types of fines that might be sought from the Federal government under the CAA: coercive and punitive. Coercive fines are imposed to induce Federal facilities to comply with injunctions or other judicial orders designed to modify non-compliant behavior. Punitive fines and penalties are imposed to punish past violations of Federal environment enforcement programs or EPA-authorized state environment enforcement programs.

State-imposed Fines and Penalties for Clean Air Act (CAA) Violations

The Federal facilities provision of the CAA [§118\(a\)](#) is a limited waiver of sovereign immunity that subjects Federal facilities to state regulation under state laws designed to

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abate and control air pollution. Section 118 permits suit against the Federal government in state court or in a state administrative proceeding for injunctive relief requiring compliance with state law. However, the Air Force position maintains there is no waiver of sovereign immunity associated with state-imposed civil fines and penalties (coercive and punitive) for violations of air pollution control laws and regulations. Only Congress can effectively waive sovereign immunity with respect to a law's requirements, therefore, Air Force installations are not permitted to pay such state-imposed fines. Federal agencies are only authorized to spend money for purposes authorized by law. Accordingly, the payment of state-imposed civil fines for violations of state air laws and regulations by an Air Force installation would be in violation of the Anti-Deficiency Act (ADA), [31 U.S.C. §§1341\(a\), 1349\(a\) and 1350](#). Note: The ADA provides for criminal penalties or recoupment of an expenditure from the personal funds of any Federal employee found to have expended Federal funds for an unauthorized activity or purpose.

Air Force policy also states that we are not authorized to pay state-issued *civil* fines and penalties for violations of state air pollution control laws and regulations, except for those Air Force installations located in the 6th Judicial Circuit (i.e. Kentucky, Michigan, Ohio, and Tennessee). This exception will be discussed in further detail later.

If a state offers a "suspended" fine as a resolution for a notice of violation (NOV), you must not accept it. A [20 Sep 96 SAF/MIQ policy letter](#) strictly prohibits acceptance of suspended fines to resolve CAA NOVs. A suspended fine is imposed following noncompliance with actions required to bring an installation into compliance with applicable air quality control laws. Also, supplemental environmental projects (SEPs) may not be substituted for state-imposed civil fines. The Air Force may, however, be required to pay for properly documented administrative and investigative costs associated with a CAA violation or enforcement action.

EPA-issued Fines and Penalties for CAA Violations

Air Force installations are subject to EPA-imposed fines and penalties for CAA violations. A [16 Jul 97 Department of Justice \(DOJ\) letter](#) asserted that EPA may assess civil fines and penalties against Federal agencies for CAA violations. Accordingly, Federal agencies are subject to EPA-imposed fines under [CAA §113\(d\)\(1\)](#) (i.e., fines up to \$27,500 per day of violation) and [CAA §113\(d\)\(3\)](#), EPA's 'field citations' program which is still undergoing development.

Even though Air Force installations are subject to EPA-imposed fines and penalties for CAA violations, it is important to remember that defenses to an EPA-imposed fine may exist. For example, pursuant to CAA §113(d), EPA's authority to issue administrative penalty orders is "limited to matters where the total penalty sought does not exceed \$200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action." It is important to note, however, that the

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statute also provides that EPA and DOJ can jointly determine that a larger penalty or longer period of violation may be deemed appropriate for a specific violation.

Court Decisions

There have been several court actions in recent years challenging our claim of sovereign immunity from payment of state-imposed civil fines for CAA violations. To date, two Federal court opinions have sided with the Air Force position and one has sided against it. In 1995, United States v. Georgia Department of Natural Resources, 897 F. Supp. 1464 (N.D. Ga, 1995), the 11th Circuit U.S. Court of Appeals held that the Federal facilities provision of the CAA does not waive sovereign immunity for state-imposed civil penalties. In 1998, the U.S. District Court for the Eastern District of California dismissed a suit brought by the Sacramento Air Quality Management District against the Air Force for CAA violations. As in the case mentioned above, the court decided that the CAA does not waive sovereign immunity for state-imposed punitive fines and penalties.

In United States of America v. Tennessee Air Pollution Control Board, 967 F. Supp 975 (M.D. Tn 1997)—a case against the Army—the district Federal court held that a clear waiver of sovereign immunity exists in CAA §118 and §304 with respect to state-imposed punitive civil penalties for violations of state laws and regulations. The Army appealed the case to the 6th Circuit U.S. Court of Appeals, which sided with the opinion of the District Court. The decision was made not to appeal to the Supreme Court. As a result, for installations located in the states of the 6th Circuit, i.e., Kentucky, Michigan, Ohio and Tennessee, the 6th Circuit Court opinion holds. This means Air Force installations in these states are subject to state-imposed civil fines and penalties for violations of state air pollution laws and regulations. In all other states, the Air Force position is that we will not pay state-imposed civil fines and penalties for violations of state air pollution control laws and regulations. Even though the 11th and 6th Circuit Court decisions are split, DoJ decided not to appeal the sovereign immunity issue to the U.S. Supreme Court on behalf of DoD.

The recent outcome of an ongoing court case further complicates matters. The case of People of California v. U.S.A. involves the imposition of fines by the Sacramento Air Quality Management District on an Air Force installation for violations of air pollution control regulations. The Federal District Court decided in favor of the Air Force that Congress had not waived the United States' sovereign immunity from liability for civil penalties imposed by states to punish past violations of state and local air quality laws. On 14 Jun 00, the 9th Circuit U.S. Court of Appeals vacated the Federal District Court decision and directed that the case be sent down to the state court for decision. The basis of the 9th Circuit Court's opinion was that the Federal District Court lacked jurisdiction to consider the merits of the case. Until this case is resolved, the Air Force position will remain that we will not pay state-imposed civil fines for state air pollution

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control laws and regulations in any state other than Kentucky, Michigan, Ohio and Tennessee.

What to Do if You are Issued a Fine for a CAA Violation.

If an Air Force installation is issued a fine for a CAA violation, regardless of whether it is imposed by a state or EPA, the installation should immediately consult with its legal staff and MAJCOM for guidance. The installation should not pay the fine without coordination with their legal support first. The issue of paying fines has become more complicated with the passage of the 1999 DoD Appropriations Act which prohibits paying fines or SEPs under the environmental statutes from FY 00 funds without prior authorization by Congress. DoD established guidance that requires the various services to request approval through command channels when regulators assess any fines.

The Army Environmental Law Division prepared a [sample letter](#) to state regulators invoking sovereign immunity from payment of state-imposed civil fines. The letter may be useful to Air Force installations in developing a response for those states where we claim sovereign immunity from state-issued civil fines and penalties for CAA violations. If an Air Force installation uses the sample letter as a guide for a response to a state, be sure to coordinate the response with your legal support before submitting the response to the state.

Even though the Air Force is subject to EPA-imposed fines for CAA violations, it is important to consult with your legal staff and MAJCOM before responding to the fine. There may be defenses (as mentioned earlier) available to address the fine, and requests must be made to Congress for approval prior to paying.

Summary

The Air Force will *not* pay state-imposed 'civil' CAA fines and penalties except in Kentucky, Michigan, Ohio and Tennessee. A civil fine is a fine imposed on a facility to punish for past violations of air pollution control laws and regulations. Payment of such fines in states other than the 6th Circuit states would be in violation of the Anti-Deficiency Act, which provides for criminal penalties or recoupment of the funds paid for such a fine from the personal funds of the Federal employee who pays the fine.

The Air Force *will* pay court-imposed 'coercive' fines associated with violations of state air pollution control laws or regulations. Coercive fines are fines imposed to induce Federal facilities to comply with injunctions or other judicial orders designed to modify non-compliant behavior.

The Air Force *will* pay EPA-imposed fines and penalties for CAA violations. However, if an installation is assessed a fine by EPA for CAA violations, the installation should

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coordinate with their legal support before responding to EPA. Again, procedures must be followed for approval prior to spending funds on properly assessed fines.

Lastly, it is important to note that even though the Air Force does not pay state-issued civil fines for CAA violations in states other than Kentucky, Michigan, Ohio and Tennessee because we do not have the legal authority to do so, our lack of authority to pay in no way exempts Air Force installations from complying with the requirements of the CAA. Federal agencies are bound to comply with all laws and regulations for air pollution control and are subject to payment of administrative fees and any court-imposed coercive fines. Air Force installations are also obligated to correct any CAA violations as soon as possible.